Supreme Court, U.S.
FILED
MAR 8 1993
OFFICE OF THE CLERK

No. 92-1110

In the Supreme Court of the United States

OCTOBER TERM, 1992

DENNIS WELLIVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights were violated when one of his employees turned over petitioner's business records to the government.

2. Whether the district court committed plain error in permitting jurors to question some of the witnesses at trial.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Church of Scientology v. *United States*, 113 S. Ct. 447 (1992)	8
Hoffa v. *United States*, 385 U.S. 293 (1966)	6
Lewis v. *United States*, 385 U.S. 206 (1966)	6
Marshall v. *Barlow's Inc.*, 436 U.S. 307 (1978)	5
Mason v. *Pulliam*, 557 F.2d 426 (5th Cir. 1977)	8
United States v. *Leary*, 846 F.2d 592 (10th Cir. 1988)	7
United States v. *Matlock*, 415 U.S. 164 (1974)	5
United States v. *Miller*, 425 U.S. 435 (1976)	5, 6, 7
United States v. *Miller*, 800 F.2d 129 (7th Cir. 1986)	5-6
United States v. *White*, 401 U.S. 745 (1971)	6
United States v. *Young*, 470 U.S. 1 (1985)	9
United States v. *Ziperstein*, 601 F.2d 281 (7th Cir. 1979), cert. denied, 444 U.S. 1031 (1980)	5, 6

Constitution and statutes:

U.S. Const. Amend IV	4, 5, 6
18 U.S.C. 641	2
18 U.S.C. 1014	2
18 U.S.C. 1341	2
18 U.S.C. 1343	2

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1110

DENNIS WELLIVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-A16, is reported at 976 F.2d 1148.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1992. The petition for a writ of certiorari was filed on December 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted on two counts each of mail fraud, in violation of 18 U.S.C. 1341; making false statements, in violation of 18 U.S.C. 1014; and theft, in violation of 18 U.S.C. 641; and on three counts of wire fraud, in violation of 18 U.S.C. 1343. He was sentenced to six months' home confinement, three years' probation, a period of community service, and a fine. Pet. App. A1-A2, A5. The court of appeals affirmed. *Id.* at A1-A16.

1. The Federal Crop Insurance Corporation (FCIC), an agency of the United States Department of Agriculture, provides farmers with crop insurance through reinsurance agreements with private insurance companies. The private companies issue the policies, collect the premiums, and settle claims. The FCIC reimburses the companies for their administrative expenses and for losses paid out to farmers. Reimbursements are based on monthly reports that the private insurance companies are required to compile, certify as correct, and send to the Crop Hail Insurance Actuarial Association (Crop Hail). Crop Hail processes the reports for the FCIC, creates a monthly accounting report, and sends it to the company, which in turn submits it to the FCIC for payment. Pet. App. A2.

Petitioner was the sole proprietor of Omaha All Risk Insurance Services. In that capacity, he functioned as the managing agent for two companies (Omaha Indemnity and Omaha Property and Casualty) that had reinsurance agreements with the FCIC. Petitioner conducted all of the daily transactions between the insurance companies and the FCIC. Petitioner was also the sole proprietor of Nebraska Computer and Financial

Services, a company that did the accounting and computer work for Omaha All Risk. Pet. App. A2-A3.

In May 1987, petitioner met with Evelyn Tuma, a computer programmer at Nebraska Computer, and Terry Anderson, petitioner's director of computer programming. At the meeting, they discussed the delayed entry of Omaha All Risk's 1987 premium information into their computer system, which had resulted in late reporting of the data to the FCIC and a delay in reimbursement to the insurance companies. Petitioner directed the employees to "roll over" 1986 premium information and submit it to Crop Hail as current 1987 information. Petitioner also directed Anderson to keep a list of rolled over policies and ordered Tuma to write a program to roll over the policies. Pet. App. A3. In March 1988, petitioner also instructed Anderson and Tuma to "double" approximately $80,000 of losses on Crop Hail's reports by changing the "seed code." Changing the code allowed petitioner to report a single loss twice. Anderson doubled a loss from a California policy; Tuma doubled losses from various other policies. *Ibid.* at A3.

In 1988, Gary Diers, a Department of Agriculture investigator, began an investigation of Omaha All Risk on an unrelated matter. In May 1988, Diers questioned Tuma about Omaha All Risk's business practices. Tuma told Diers about the rollovers and mentioned that Omaha All Risk maintained some incriminating documents at its offices. Diers asked whether Tuma could obtain the documents for him, as long as they were not under "lock and key" and were not "something [she] shouldn't be looking at anyway." Pet. App. A4. Unsure whether she should comply with Diers' request, Tuma sought advice from a local sheriff, who told her that he thought she was entitled to take the documents. Tuma retrieved several documents, including some from Anderson's desk drawer, to which both she and Anderson had regular

access. She then gave the documents to Diers. The documents included an internal Omaha All Risk computer printout that was used to change the "seed code" for doubling losses; Tuma's handwritten notes on the policies she used to double losses; a computer printout Tuma created of raw data pertaining to doubling; a printout of the program Tuma created to roll over 1986 policies into the 1987 year; computer printouts of rolled over policies that Tuma sent to FCIC; and a computer printout containing a comprehensive listing of rolled over policies. The documents were used to prepare search warrants for Omaha All Risk's Nebraska and Texas offices. The warrants were executed on October 25, 1988, and the information obtained led to petitioner's prosecution. *Id.* at A4-A5 & n.2.

Prior to trial, petitioner moved to suppress the business records that Tuma gave to Diers. The district court denied the motion on the ground that Tuma was not an agent for the government and that petitioner had no expectation of privacy in the documents. Pet. App. A4-A5.

2. The court of appeals affirmed. First, the court held that the seizure of petitioner's business records did not violate the Fourth Amendment. The court reasoned that, because the reinsurance agreements with the FCIC required production of any records concerning matters relating to the agreements, petitioner had no reasonable expectation of privacy in the records at issue. The court stated that, even though petitioner's company, Omaha All Risk, was not a party to the reinsurance agreements between the FCIC and the primary insurers, petitioner was nevertheless bound by the agreements' terms because his company was required to comply with the same rules and regulations as the reinsured companies. Pet. App. A3, A5-A11.

The court also held that the district court did not plainly err in permitting some members of the jury to question witnesses during the trial. Although the court expressed its displeasure with that practice, it held that the absence of any showing of prejudice in the record precluded reversal in this case. Pet. App. A14-A15.

ARGUMENT

1. Petitioner contends (Pet. 13-22) that the district court should have suppressed the records that were taken from his company's business premises by his employee, Tuma, and turned over to the Department of Agriculture. The court of appeals correctly resolved that issue against petitioner, and it does not merit further review.

The records at issue in this case were business records that were prepared by petitioner or Tuma, and Tuma was authorized to have access to those records in connection with her responsibilities. Pet. App. A5 n.2, A20. By exposing the records to his employees, petitioner abandoned any expectation of privacy in those records, at least with respect to his employees. See *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 315 (1978); *United States* v. *Miller*, 425 U.S. 435, 442 (1976); *United States* v. *Miller*, 800 F.2d 129, 134 (7th Cir. 1986); *United States* v. *Ziperstein*, 601 F.2d 281, 289 (7th Cir. 1979), cert. denied, 444 U.S. 1031 (1980).

Because petitioner had charged Tuma with the responsibility for preparing the records and had granted her a general right of access to the records and to the places where they were kept, Tuma could validly consent to reveal those records to the government without violating petitioner's Fourth Amendment rights. See *United States* v. *Matlock*, 415 U.S. 164, 170 (1974) (valid consent given by one party having common authority over premises or effects sought to be inspected); *United*

States v. *Miller*, 800 F.2d at 134 (documents that employees observe in their daily functions are beyond the protection of the Fourth Amendment, as long as employees have legitimate access to the documents as part of their business responsibilities); *United States* v. *Ziperstein*, 601 F.2d at 289 (no impropriety in pharmacy employee obtaining control over, and revealing to the government, his employer's pharmaceutical records "which serve as the basis of [the employee's] daily activities").

No doubt, petitioner hoped that Tuma would not disclose the incriminating documents to the government or otherwise reveal his unlawful scheme. But a wrongdoer who enlists others to assist him takes the risk that the others will cooperate with law enforcement authorities and produce evidence against the wrongdoer, even while purporting to maintain their relationship with him. See *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966); see also *United States* v. *Miller*, 425 U.S. at 443 ("This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."); *United States* v. *White*, 401 U.S. 745, 749 (1971) (opinion of White, J.); *Lewis* v. *United States*, 385 U.S. 206 (1966). The conduct of such an informant does not violate the wrongdoer's Fourth Amendment rights, as long as the informant does not exceed the scope of his authority as an employee, associate, or invitee.[1] For that reason,

---

[1] Thus, as the Seventh Circuit pointed out in *Ziperstein*, 601 F.2d at 289-290, an employee would not be entitled to remove documents from his workplace if they were not related to the duties of the employee who took them, or if the employee did not have legitimate access to the documents.

Tuma's voluntary disclosure of the business records that she had prepared and to which she had a general right of access did not violate petitioner's rights and require suppression either of those records or of the materials obtained pursuant to the later warrant-authorized searches.

As the court of appeals noted, Pet. App. A11, the nature of the documents disclosed and the FCIC's broad right of access to petitioner's business records lend further support to the view that Tuma's conduct did not violate any legitimate expectation of privacy on petitioner's part. The terms of the reinsurance agreements between petitioner's client companies and the FCIC, which the court of appeals found were binding on petitioner, required the periodic production of any records relating to the insurance reimbursement program for the purpose of any investigation, audit, or examination. Pursuant to that agreement, petitioner had previously furnished his business records to the FCIC and Crop Hail. Gov't C.A. Br. 14. Because petitioner's records were required to be made available for regular government inspection, the contents of those documents did not constitute private matters of the sort that ordinarily are deemed to support a reasonable expectation of privacy against governmental inspection. See *United States* v. *Miller*, 425 U.S. at 442-443 (banking records that are required to be maintained because they have a high usefulness in criminal, tax, and regulatory investigations). Thus, on the facts of this case the court of appeals correctly held that peti-

tioner could not challenge the seizure of his business records.[2]

2. Petitioner also contends (Pet. 22-27) that the district court erred by allowing the jurors to question some of the witnesses at trial. The procedure is reviewed only

---

[2] This analysis is not inconsistent with the decision in *United States* v. *Leary*, 846 F.2d 592 (10th Cir. 1988). In that case, the Tenth Circuit held that two export traders had a reasonable expectation of privacy in their business records. Although the federal regulation at issue in *Leary*, 846 F.2d at 597, stated that export businesses "may be requested" to produce required records and "make them available for inspection," the regulation also authorized the government to obtain an administrative or judicial subpoena of the pertinent records in the event that "voluntary cooperation is not forthcoming." The court of appeals explained that the regulation's explicit provision for "judicial review before records [could] be seized without permission," created a reasonable expectation of privacy in the defendant's business records. *Ibid.* Here, in contrast, the terms of the reinsurance agreements that were binding on petitioner specifically required him to produce his business records on request, without the option of voluntarily producing his records or submitting to legal process. Accordingly, the reasoning in *Leary* has no force in these circumstances.

Petitioner's reliance on *Mason* v. *Pulliam*, 557 F.2d 426 (5th Cir. 1977), is also misplaced. *Mason* held only that a businessman who consents to the seizure of his business records by a government agent may subsequently withdraw his consent and demand the return of those records. No issue concerning the limits of consent are presented in this case. Nor does the decision below conflict with *Church of Scientology* v. *United States*, 113 S. Ct. 447 (1992). There the Court held that an appeal from an order enforcing an IRS summons against certain tapes containing tax records was not moot merely because the IRS had obtained and listened to the tapes. The Court stated that the IRS's continued physical possession of the tapes invaded the taxpayers' "interest in maintaining the privacy of his 'papers and effects.' " 113 S. Ct. at 450. In this case, Tuma's valid consent to the disclosure of the business records to which she had access overrode petitioner's interest in withholding the records from the government.

for plain error because petitioner did not object to the questioning at trial.[3] The plain error doctrine requires reversal only if the error resulted in a miscarriage of justice. *United States* v. *Young*, 470 U.S. 1, 14-16 (1985). Here, although petitioner argues generally that it is inadvisable for a court to allow the jurors to question witnesses, he has not explained how any particular question prejudiced him. Under these circumstances, the court of appeals was correct to hold that there was no plain error.

Petitioner further contends that the circuits follow different practices with regard to allowing questions by jurors. In no circuit, however, is the practice considered plain error. The circuits are therefore not in conflict on the issue presented by this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS E. BOOTH
Attorney

MARCH 1993

---

[3] Petitioner argues (Pet. 9) that he did not object to jurors' questions because he did not want to offend the jury. However, petitioner could have objected to the questions at a point in the trial when the jury was absent. Petitioner also contends (*Ibid.*) that the district court erred by selectively barring two juror questions that were favorable to the defense. Neither question was relevant, however, Pet. App. A14, so each was properly excluded.